No. 147

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF WEST VIRGINIA, AT THE RELATION OF DR. N. H. DYER, ET AL., ETC., PETITIONERS

v.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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This case involves the power of the State of West Virginia and other States in the Ohio River Basin to enter, with the consent of Congress, into the Ohio River Valley Water Sanitation Compact. 54 Stat. 752. The Compact establishes a commission, composed of representatives of all these States and financed by contributions from the States, with power to take action for controlling and abating

pollution of the waters of the Ohio River and its tributaries. Determination of the basic issue of West Virginia's power and capacity to participate in these activities is of great importance to the control of pollution, not only of the Ohio River and its tributaries, but of interstate waters generally. It also affects the power of all States of the United States to take cooperative action to attack common problems in all fields through joint use by the States of their police power. Because of the importance of the issues presented, and because we believe that the Supreme Court of Appeals of West Virginia has decided Federal questions of substance not heretofore determined by this Court, we believe that granting of the petition for certiorari in this case would be in the public interest.

STATEMENT

The pertinent facts in the case are not in dispute and are fully set forth in the petition for certiorari and supporting brief filed in this court by the State of West Virginia.

INTEREST OF THE UNITED STATES

The Federal Government is directly interested in the full and proper functioning of the Ohio River Valley Water Sanitation Commission, on which it is represented by three nonvoting members under the terms of the Compact. These Federal members are appointed by the President, and represent, respectively, the Public Health Service in the Federal Security Agency, the Corps of

Engineers of the United States Army, and the Fish and Wildlife Service in the Department of the Interior.

The Government's interest, however, is not confined to the fact that it participates as a member in the work of the Ohio River Valley Water Sanitation Commission. As will be set forth in more detail below, the issues raised by the decision below are of fundamental importance in the entire field of water pollution control. This field is one of Federal concern. The passage of the Water Pollution Control Act, 62 Stat. 1155 (Public Law 845, 80th Congress; 2d Sess., approved June 30, 1948) established a broad program of cooperative activity between Federal and State governments and interstate agencies for eliminating or reducing pollution and improving the sanitary condition of waters. At the Federal level, the Act is administered by the Surgeon General of the Public Health Service. While the Federal Government contributes financial and technical assistance and is developing an over-all comprehensive program of water pollution control, the Act recognizes the primary rights and responsibilities of the States in dealing with the problem. The Federal Government, therefore, clearly has a legitimate interest in preserving the effectiveness of any agency through which the States are furthering the program which the Government is fostering under the Water Pollution Control Act. And since Section

2 (b) of the Act specifically directs the Surgeon General to—

> encourage cooperative activities by the States for the prevention and abatement of water pollution; encourage the enactment of uniform State laws relating to water pollution; *encourage compacts between States for the prevention and abatement of water pollution;* . . . [Italics supplied.]

it is plain that the Congress has indicated a direct concern in preserving the effectiveness of just such agencies as the Ohio River Valley Water Sanitation Commission.

In the administration of the Water Pollution Control Act, moreover, the Surgeon General has maintained a close cooperative relationship with the Commission and has made grants under Section 8 (a) of the Act to the Commission and other interstate agencies for the conduct of studies relating to water pollution caused by industrial wastes.

Finally, the Federal Government has a general interest in the preservation of interstate compacts, particularly those relating to interstate waters. In furtherance of this interest, the Government has filed supporting memoranda in this Court in previous litigation concerned with an interstate compact on water apportionment. *E. g., Hinderlider v. LaPlata Co.*, 304 U. S. 92. As was pointed out in one of these memoranda (Memorandum on Behalf of the United States, No. 437, October Term, 1937, p. 5)—

The Federal Government, of course, is anxious that the States have the power expeditiously and effectively to arrange and to adjust the difficulties which must arise because of the territorial division of political jurisdiction within a single economic society. This interest is attested by the power given to Congress by the Constitution to approve or disapprove the compacts of the States.

DISCUSSION

1. *Effect of the decision below on the operation of the Ohio River Compact.* Even if the position of the West Virginia Supreme Court is not adopted by any other State, the decision below would have a crippling effect on the operation of the Ohio River Valley Water Sanitation Compact. As is apparent from a glance at the map of the Ohio River Basin, West Virginia is an upstream State. The main stem of the Ohio River forms its northern boundary over several hundred miles, and within its territory are found a number of the principal tributaries, including the Monongahela, the Kanawha, the Little Kanawha, the Guyandot, and the Big Sandy. Ten per cent of the population of the Basin lives in West Virginia and at least ten per cent of the industrial wastes discharged into the Ohio River and its tributaries are discharged in West Virginia. In the important fields of acid drainage from coal mines and wastes from manufacturing chemical establishments, the contribution of West Virginia

is in an even higher proportion.[1] It can readily be seen, therefore, that inability to control discharges of pollution from municipalities and industrial concerns in West Virginia will cast an extremely heavy burden on the efforts of the other States to maintain the purity of the river. This is particularly true of Ohio, Kentucky, and Indiana, which are located downstream from West Virginia on the main stem of the river. In addition, the acid drainage from the coal mines of West Virginia into the Monongahela River results in a serious problem for the State of Pennsylvania.

2. *Bearing of the decision below on the general effectiveness of interstate compacts, particularly in the field of water pollution control.*

(a) Perhaps the most serious aspect of this case is that the decision of the West Virginia Supreme court, if it were followed, would deal a severe blow to the States' power to enter into compacts for cooperative action to meet common problems. Under the majority opinion below, any compact establishing an interstate agency would be invalid if it provided either for future contribution by the States to meet the expenses of the agency or for exercise of any police power by the agency. On the latter point, the court's decision is sweeping. It does not merely impose a limitation on the extent to

[1] These statistics are taken from the Report of the Ohio River Committee (House Document No. 266, 78th Congress, 1st Session) pages 8-24.

which regulatory power may be delegated to such an agency but prohibits entrusting it with any powers of enforcement.

The reasoning of the opinion is applicable to the constitutions of most States as well as to West Virginia. Debt limitations comparable to Article X, Section 4 of the West Virginia Constitution are common. As to the police power, the Court referred to no specific provisions in the organic law of the State, but based its holding on general principles of constitutional law. Presumably, the same reasoning would be equally valid as to the constitution of any other State in the Union.

Either of these objections would be fatal to a high proportion of the interstate compacts which are being adopted in constantly increasing numbers every year. Of the 31 interstate compacts ratified by the Congress from 1934 to 1949, over half established interstate agencies with provision for financial contribution by participating States. See Council of State Governments, *Book of the States, 1950-1951*, pp. 26-31. In a substantial number of these and other compacts, moreover, enforcement powers have been vested in an interstate agency or concurrent penal jurisdiction has been provided for two or more States. Thus, under these compacts, participating States have agreed to exercise of police power on matters within their jurisdiction by interstate agencies or other States in the fields of water pollution control, supervision of parolees and probationers, police control over navigable waters,

and other subjects. All these compacts would presumably be void under the principles declared in the West Virginia court's opinion, and certainly the decision below will bar the State of West Virginia from entering into most types of interstate compacts. An authoritative determination of this Court would be most helpful in resolving the fundamental questions raised by the Supreme Court as to the States' ability to enter into compacts and the validity of many existing compacts.

(b) The necessity for cooperation among the States in the field of control and abatement of water pollution is particularly urgent. The waters of the streams and lakes of this country are essentially interstate in character and interstate action is required to preserve their purity. Our great rivers almost without exception flow across or along the boundaries of several States, and the lesser streams are tributaries to these interstate rivers. Discharge of pollution into any stream, therefore, necessarily has its effect on the quality of the waters flowing through other States. It follows that the downstream States cannot maintain the purity of their waters unless discharges of municipalities and industrial establishments in the upstream States are controlled. Inherent ir the nature of the problem is the fact that such controls must be exercised at the point of discharge. Once the polluting material has been discharged into the stream it is too late for any treatment to correct its harmful effect.

It is true that States and their citizens have a remedy in the courts to protect themselves against pollution of the waters which they use. Action may be instituted in an appropriate forum to enjoin excessive discharges of waste, where actual damage can be shown. Resort to this remedy, however, necessitates long drawn-out litigation which in the end may afford no conclusive solution to the problem. To avoid this difficulty, the States should be free to solve the problem through agreement and compact, and if necessary to establish administrative agencies to insure continuity of administrative control over the affected region.

These principles have been recognized by this Court. In *New York* v. *New Jersey*, 256 U. S. 296, after passing on the merits of a complicated and difficult controversy between the two States arising out of disposal of sewage in New York Bay, the Court, speaking through Mr. Justice Clarke, made the following comment (256 U. S. at 313):

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court, however constituted.

See also *Hinderlider* v. *La Plata Co.*, 304 U. S. 92,

104-106; Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, (1925) 34 Yale Law Journal 685, 708.

Recognizing these principles, States have more and more adopted the course of entering into collective agreements for regional control of the pollution of waters in which they have an interest. An outstanding example of this tendency is, of course, the compact which is the subject of the present case. The agreements setting up the Interstate Commission on the Potomac River Basin, the New England Water Pollution Control Commission, the Tri-State Waters Commission (Minnesota, North Dakota, and South Dakota), and the Interstate Sanitation Commission (Connecticut, New Jersey, and New York), may also be cited. In addition, a number of other agreements have been entered into by various States with respect to water resources development, which are not primarily directed to pollution control but include this activity among the principal functions of the agencies established. Examples are the Interstate Commission on the Delaware River Basin and the marine fisheries commissions set up for the Atlantic, Gulf, and Pacific Coast States.

If the ruling of the Supreme Court of West Virginia is followed by other courts, the effectiveness of all these interstate agencies will, at the least, be seriously impaired, and it may be that the compacts

establishing the commissions will be entirely invalidated. Under the first of the principles on which the court relies, the States could not bind themselves to contribute to the cost of operation of the agencies. Furthermore, the restriction on the exercise of police power, as announced in the opinion below, would raise a question both as to the validity of water quality standards established under these compacts and also as to the obligation of the participating States to comply with or enforce them.

3. *Federal questions presented.* It is not our purpose to discuss in detail the legal issues involved in this case at this time. It seems manifest, however, that it involves substantial Federal questions which are properly justiciable in this Court. In the first place, the West Virginia court could not have decided the case without passing on important questions of construction of the Compact. Thus, it was necessary for that court to interpret the Compact as creating a "debt" of a signatory State; as creating an agency of other States and the Federal Government, and delegating to it the police power of West Virginia; as being irrevocable and perpetually binding on the State of West Virginia and other participating States; and as binding future legislatures to make appropriations for the expenses of the Commission. It is settled that a decision by the highest court of a State passing upon the construction of an interstate compact in-

volves a federal right, privilege, or immunity, which, when specially set up and claimed in the State court, may be reviewed by this Court under Section 1257(3) of Title 28. *Delaware River Joint Toll Bridge Commission* v. *Colburn*, 310 U. S. 419, 427; see *Hinderlider* v. *LaPlata Co.*, 304 U. S. 92, 110.

Secondly, the State court passed on the validity of the Compact which had been ratified by the State of West Virginia and approved by Congress. This also presents an issue for resolution by this Court, and in its review of the West Virginia court's decision the Court would not appear to be bound by the State court's determination even on the interpretation of the State constitution and statutes, or the internal authority of the State to enter into this Compact. *Kentucky* v. *Indiana*, 281 U. S. 163, 176-177; *Stearns* v. *Minnesota*, 179 U. S. 223; *Virginia* v. *West Virginia*, 220 U. S. 1.

Finally, the case may involve substantial and far-reaching questions, under the Federal constitution, as to the inherent power of States to enter into interstate compacts of this nature, and of the effect and validity of a State's attempt, in its own constitution, to disable itself from participating in such agreements.

CONCLUSION

In the Government's view, the public importance of the issues in this case ~~are~~ such that this Court should grant the petition for certiorari. The Court

has in the past emphasized the propriety under the Constitution, and the desirability as a matter of public policy, of agreements between States for the resolution of common problems. The decision of the West Virginia court, if allowed to stand, would cast doubt on the power of States to enter into such compacts, not only in the field of water pollution control, but in all areas in which joint exercise of their police power by States has been felt to be desirable. The issues of interpretation and validity of the compact presented in this case are federal questions which may properly be reviewed by this Court on certiorari. Indeed, the confusion and uncertainty which will necessarily follow from the decision of the West Virginia court can be resolved only by an authoritative decision of this Court.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

ARNOLD RAUM,
Acting Solicitor General.

AUGUST 1950.

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